In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-86

MCCLATCHY NEWSPAPERS, a corporation; ELEANOR MCCLATCHY; C. K. MCCLATCHY; BYRON CONKLIN; and CARLO BUA,
Petitioners,

vs.

WILLARD M. NOBLE and ETTA M. NOBLE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

G. JOSEPH BERTAIN, JR.,
TIMOTHY H. FINE,
50 California Street, Suite 955,
San Francisco, California 94111,
Telephone: (415) 981-4938,
Attorneys for Respondents.

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105

Subject Index

Table of Authorities Cited

Cases

Rules

Statutes

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1976

No. 76-86

MCCLATCHY NEWSPAPERS, a corporation; ELEANOR MCCLATCHY; C. K. MCCLATCHY; BYRON CONKLIN; and CARLO BUA,
Petitioners,

vs.

WILLARD M. NOBLE and ETTA M. NOBLE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (App. A of Petition) is officially reported at 533 F.2d 1081. No opinion was rendered by the District Court for the Northern District of California.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether or not certain agreements or practices, which fall within the category of *per se* offenses, are conclusively presumed to be unreasonable, and therefore illegal *per se,* when they operate on news and advertisements transmitted in interstate commerce for the sole purpose of immediate and profitable reproduction and distribution to the reading public?

2. Whether or not the rule that it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it should be amended to permit an exemption for the distribution of news and advertisements transmitted in interstate commerce for the sole purpose of immediate and profitable reproduction and distribution to the reading public?

3. Whether or not it is error to specifically inform the jury that it is the function and duty of the court in the event that the jury should award damages to treble that amount in the judgment.

STATUTES INVOLVED

The pertinent provisions of the Sherman Act (26 Stat. 209, as amended, 15 U.S.C. §1) and the Clayton Act (38 Stat. 731, 15 U.S.C. §15) are set forth in the Petition at pp. 2-3.

STATEMENT OF THE CASE[1]

The parties stipulated to the following facts (CT 346) pertaining to interstate commerce:

"The Sacramento Bee is the only daily newspaper of general circulation published in the afternoon, Monday through Friday, in Sacramento, California. Its total average paid circulation for the twelve months ending March 31, 1965 through March 31, 1970 is as follows:

12 mos. ending	*Av. daily pd. cir.*	*Av. Sun. pd. cir.*
1965	171,204	191,981
1966	174,773	197,859
1967	177,265	202,044
1968	175,747	203,502
1969	174,404	206,810
1970	173,250	210,096

"The Sacramento Bee is distributed in California, in Nevada, in Oregon, in other States of the United States, and in foreign countries. Some of the news, feature materials, comics and other information published in the Sacramento Bee is regularly gathered from all parts of the United States and from foreign countries and is distributed and delivered by various means in interstate and foreign commerce to the Sacramento Bee. Some of the advertising published in the Sacramento Bee is sold in interstate commerce through-

---

[1]Respondents were the plaintiffs in the District Court and will hereinafter be referred to as plaintiffs. Petitioners were the defendants in the District Court and will hereinafter be referred to as defendants. RT refers to the Reporter's Transcript of the trial proceedings; CT refers to the Clerk's Transcript on appeal to the United States Court of Appeals; and Plts. Ex. refers to plaintiffs' exhibit admitted in evidence at the trial.

out the United States. In the sale of such advertising there is a continuous flow in interstate commerce of advertising contracts, copy and payments between advertisers and the Sacramento Bee. In addition, some of the advertising published in the Sacramento Bee pertains to goods and services produced and sold throughout the United States. Such advertising helps develop markets for such goods and services."

In addition, Plts. Ex. 60 admitted into evidence sets forth as of April 22, 1970 the name of each wire and/or news service purchased by McClatchy Newspapers and the name of each comic and other feature which was purchased for publication in The Sacramento Bee. (RT 1986-87). Also, Mr. John Hamlyn, general counsel for McClatchy Newspapers, testified that the firm of Cressmer, Woodward, O'Mara & Ormsbee is McClatchy Newspapers' national advertising representative, that they have offices throughout the United States, and that their function is to "contact advertising agencies and national advertisers and attempt to secure from them national advertising to appear in the Sacramento Bee." (RT 111). Mr. Hamlyn testified that the advertisement is prepared by either the national advertiser or his agency or both, that the advertisement is either in the form of copy or a mat, and that the copy or mat is shipped through the mails to Sacramento from cities throughout the United States. (RT 113). Mr. Hamlyn testified that over ninety five percent of all newsprint used by The Sacramento Bee comes from outside the State of California. (RT 119).

Finally, Mr. Hamlyn testified that except for distribution through the mail, The Sacramento Bee is distributed through independent carriers, country distributors and city newsstand distributors (RT 141); that news stories received by The Sacramento Bee through the various wire services were in The Sacramento Bee handled by plaintiffs and other independent carriers and distributors; that the features, comics and syndicated columns which were subscribed to by The Sacramento Bee were in The Sacramento Bee handled by plaintiffs and other independent carriers and distributors; and that the national advertising originating throughout the United States was in The Sacramento Bee handled by plaintiffs and other independent carriers and distributors.

Plaintiff Willard N. Noble became an independent contractor for the purchase, distribution and resale of The Sacramento Bee to retail outlets and from vending machines on October 1, 1960 in an area known as Newsstand No. 5, located in the counties of Sacramento and Placer in the State of California. (CT 343-44). At that time Newsstand No. 5 was one of nine newsstand areas served by independent contractors, known as newsstand distributors; it was the largest newsstand geographically, but one of the smallest in circulation. (RT 1647-48).

Plaintiff Willard M. Noble testified that when he became a Sacramento Bee distributor it was a one-man operation and "I worked seven days a week myself. There wasn't great enough income at the time to start hiring somebody right off the bat." (RT

1652). Mr. Noble further testified that his wife would answer the telephone, deliver papers, do book work and count money. (RT 1652).

Mr. Noble testified that he and his wife ran the dealership without help for probably a year and a half to two years (RT 1672); that as it increased in circulation he hired one driver, then two drivers and three drivers until finally about a year and a half before his termination (on July 1 ,1969) he did not engage in the physical delivery of the newspapers except as a relief man when a driver was off (RT 1689, 1700-01); that the increase in circulation and the hiring out of the physical delivery provided increased coverage for The Sacramento Bee because he was able to give his accounts both the first and final editions (RT 1691); that the increase in circulation and the delegation of the delivery to others also made for more timely delivery because you can cover the area faster (RT 1690); and that as others took over the delivery he devoted his time to promoting the sale of The Sacramento Bee and maintaining his vending machines. (RT 1692).

Mr. Noble testified that the circulation of The Sacramento Bee in his area from the time he became a distributor until his termination on July 1, 1969 increased fourfold on the daily side and fivefold on the Sunday side. (RT 1766-67). Mr. Noble also testified that his relationship with his store customers was such that "they trusted me and we operated on an honor system" (RT 1664); that the number of newspapers he left with each store each day and the number of un-

sold newspapers he picked up the next day were unknown to the store in that they trusted his counts; and that this is unusual in this business. (RT 1662-63).

Mr. William H. Hall, who worked for Mr. Noble as a driver and, in addition, was a home delivery dealer for The Sacramento Union in District 100, testified that he observed Mr. Noble in the conduct of his business, that he and most other dealers had dealings with Mr. Noble because of his rack repair, parts and newspaper supply business, that Mr. Noble was considered a model dealer and a leader, and that "as far as I was concerned, I don't think there was a dealer at the Sacramento Bee that ran his district as efficient as Mr. Noble did because I had a district of my own, I knew what was involved in paper work procedure, the amount of hours you had to spend, and there wasn't a time that a rack was ever broken down that within a matter of an hour or so that Mr. Noble wasn't out there repairing it." (RT 1528-30).

Mr. Scott Berry, former city newsstand distributor in Newsstand No. 3, testified (via deposition testimony read into the record) that Mr. Noble ran things pretty close and pretty tight, that Mr. Noble kept accurate accountings, that he was too damned businesslike for that kind of business and that "he hired as much help as he could possibly afford to use, according to what he said, to have time to go out and pioneer new places, and get—keep his racks up, and get new stores. He'd try outlets—according to his drivers, he'd try outlets that I wouldn't even think of wasting my time on." (RT 1620-21).

Defendant Byron Conklin, circulation manager of The Sacramento Bee, testified that Mr. Noble was recognized as a man with some experience, that he was very circulation conscious (RT 1062), that Mr. Noble worked very hard to service his dealership (RT 1086) and that Mr. Noble did "a hell of a job" for The Sacramento Bee. (RT 1116).

Notwithstanding Mr. Noble's efforts in building circulation for The Sacramento Bee in Newsstand No. 5 Mr. Conklin admitted that prior to May 1969 he had suggested to Willard Noble that he split his territory. (RT 1059). Defendant Carlo Bua, assistant circulation manager of The Sacramento Bee, admitted that during various conversations with Mr. Noble he suggested to him that he should consider giving up a portion of his area.[2] (RT 837). Mr. Bua estimated the number of these conversations as five, six, or seven times. (RT 864). Mr. Bua admitted that on Saturday, May 24, 1969, the subject of splitting Mr. Noble's dealership came up during a telephone conversation between Mr. Noble and him (RT 865); that he suggested to Mr. Noble that he split Newsstand No. 5

[2]At his deposition on August 8, 1969 Mr. Bua testified under oath as follows:

"Q. Mr. Bua, have you at any time ever discussed with Mr. Willard Noble the splitting of his dealership.

A. No." (RT 860).

Mr. Bua admitted at trial making that answer but explained it as follows:

"A. I gave that answer but my answer would be to that, for I had never called Mr. Noble up on the telephone or asked him to come into the office for the specific purpose of splitting his area. The only time the question of splitting his territory ever came into the conversation was when we had a griping session." (RT 861).

(RT 866); and that Mr. Noble informed him that "under no circumstances would he want to split his distributorship." (RT 866-A).

Three days after this conversation, by letter dated May 27, 1969, Mr. Conklin, on behalf of McClatchy Newspapers, terminated plaintiffs' city newsstand distributor contract dated April 19, 1969 with a date of cancellation to be July 1, 1969. (Plts. Ex. 8, RT 869). Immediately thereafter Mr. Conklin commenced discussions with Gary C. Downing, an employee in the circulation department of The Sacramento Bee at the time, about the possibility of his becoming a city newsstand distributor in a portion of Mr. Noble's distributorship and not long afterwards notified Mr. Downing that he could be one of the two distributors to replace plaintiffs. (RT 1090-91). James P. Gallagher, Sacramento Bee distributor for Newsstand No. 2 at the time, approached Mr. Conklin "very shortly after the termination had been received by Mr. Noble" and according to Mr. Conklin, he emphatically told Mr. Gallagher "that if he was approved to take over the portion of Newsstand No. 5, that he could not continue as a distributor in Newsstand No. 2 for any length of time." (RT 1093-94). City newsstand distributor contracts were entered into with Gary and Judith Downing and James and Elizabeth Gallagher, effective July 1, 1969, for the distribution of The Sacramento Bee newspaper in plaintiffs' former territory. (Plts. Exs. 10, 12, RT 1097).

Mr. Carlo Bua, assistant circulation manager of The Sacramento Bee, testified that a few days after

plaintiffs received their termination notice, Mr. Conklin said to him, "Well, Carlo, now is the best time to split Newsstand 5. Let's work on a feasible split that we think would be profitable for those concerned and be equitable to each individual independent contractor for that area" (RT 876-77); that he suggested to Mr. Conklin that he be given the responsibility for making the split which was granted (RT 876); that on June 4, 1969, when Mr. Noble visited their offices he and Mr. Conklin informed Mr. Noble that they were splitting his distributorship (RT 873); and that at the close of the meeting he invited Mr. Noble into his office and showed him the map of the city newsstand distributorships and the split of his distributorship along Walnut Avenue. (RT 873-84).

Plaintiffs' expert on newspaper circulation department practices, Robert Gilliland, testified that it is in the best interest of circulation management to keep dealerships down to a limited size in circulation (RT 1283); that even in the case of an outstanding dealer "we would ultimately split the dealership" (RT 1283); and that "we kind of have a standing formula that an agency [i.e., dealership] of a certain size is desirable and when they reach a size larger than that, we find some way, if possible, to split it." (RT 1283). Mr. Gilliland testified that normally he would attempt to negotiate with a dealer to get him to mutually agree to a split but "there are times when this doesn't work and you have to find some means by which you can take legal action to split the area or, quite frankly, cancel the man who won't split it." (RT 1285).

Plaintiff Willard Noble testified that defendant Carlo Bua never gave any reasons in support of his suggestions that he split his territory (RT 1721); that he explained in detail to Mr. Bua why he felt he could do a better job with a larger territory than a split territory (RT 1719); that with a larger territory he had help to do the actual delivery which freed him to call on new prospective customers and allowed him to tend to his vending machine business and, which, also, provided additional income to buy more vending machines. (RT 1719-20). Mr. Noble testified that he refused defendants' suggestions to split his territory because:

> "I knew that as a small dealer, what I had experienced, working seven days a week and whether you're sick or well, and I knew that I had increased circulation and did a better job as a larger dealer. I felt I'd done a better job. And so I refused. I just—I didn't feel that this was going to accomplish anything." (RT 1722).

ARGUMENT

A. THE PETITION IS PREMATURE

The Court of Appeals below reversed the judgment of the District Court in favor of defendants and against plaintiffs on claim two, the termination claim, and remanded for a new trial because of erroneous instructions given the jury by the trial judge. The Court of Appeals held that under *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 the jury should have been

instructed that an agreement to restrict the territory in which newspapers purchased from defendant McClatchy Newspapers could be sold was a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. §1 and that it was error for the trial judge to treat territorial restrictions in the category of non *per se* offenses. *Noble v. McClatchy Newspapers,* 533 F.2d 1081, 1086. The case now goes back to the trial court for a new trial where the issue will be causation: Was a contributing factor to the termination of plaintiffs' distributorship their refusal to accede to defendants' request that they confine their sale of the Sacramento Bee to a portion of Newsstand No. 5, as plaintiffs contend? *Mulvey v. Samuel Goldwyn Productions,* 433 F.2d 1073, 1075 (9th Cir.).

Since the case must go back to the trial court for further proceedings "this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville, T. & K.R. Co.,* 148 U.S. 372, 384. See *Youngstown Co. v. Sawyer,* 343 U.S. 579, 584-85; *Cobbledick v. United States,* 309 U.S. 323, 324-25; *Hamilton-Brown Shoe Co. v. United States,* 240 U.S. 251, 258 (lack of finality "of itself alone furnished sufficient ground for the denial"); *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.,* 389 U.S. 327 ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court").

B. AN ALTERNATIVE GROUND FOR DECISION EXISTS

In the District Court the jury returned a verdict for defendants on claim two (the termination claim) and four (the monopolization claim), and for plaintiffs on claim three (the sale of business claim). Judgment was entered in favor of plaintiffs on the sale-of-business claim in the amount of $63,333.04—$15,000 in damages, trebled, costs and attorneys' fees of $18,333.04. Defendants' motion for judgment n.o.v. or a new trial on the sale-of-business claim was denied by the trial judge. *Noble v. McClatchy Newspapers,* 533 F.2d 1081, 1082-83.

The defendants appealed the judgment of the District Court. The plaintiffs filed a notice of cross appeal requesting the Court of Appeals to review, pursuant to F.R.Civ.P. 50(d), certain issues only in the event the judgment of the District Court in favor of plaintiffs was set aside.

Since the filing of defendants' petition for a writ of certiorari plaintiffs have filed a cross-petition for a writ of certiorari. *Willard M. Noble, et al. v. McClatchy Newspapers, et al.,* Docket No. 76-242, October Term, 1976. This cross-petition pertains to the Court of Appeals' reversal of the judgment of the District Court in favor of plaintiffs and against defendants on the sale-of-business claim.

In the event this Court grants plaintiffs' cross-petition for a writ of certiorari, reverses the court of appeals and reinstates the judgment of the District Court in favor of plaintiffs then it will not be necessary for this Court to reach the points raised by the

petition herein. See *Fashion Hosiery Mills v. N.L.R.B.*, 344 U.S. 863; *The Allegheny, Inc. v. Mayer,* 339 U.S. 965. Plaintiffs urge that this be the course of action herein.

C. INTERSTATE COMMERCE ISSUE NOT RAISED BY DEFENDANTS BELOW

In their petition defendants contend that "the decision below holds that, if the restraint is unreasonable because it is of a type deemed unreasonable *per se,* the second requirement—that the restraint be in or affect interstate commerce—vanishes." (Petition, p. 9). This is not correct. In its decision the Court of Appeals never discusses interstate commerce requirements because defendants never raised them in respect to the termination claim.[3]

The Opening Brief of Defendants-Appellants in the Court of Appeals, filed on or about January 10, 1973, dealt with both defendants' appeal and plaintiffs' cross-appeal. On pages 23-24 and in the Appendix of that brief defendants argued that plaintiffs were not entitled to a new trial on the second (termination) claim. Nowhere did defendants advance the argument that plaintiffs had failed to establish that the territorial restraint was not in or affected interstate commerce.

After the Court of Appeals rendered its decision on November 14, 1975, defendants had the opportunity,

[3]The only interstate commerce issue raised by defendants in the Court of Appeals was in respect to claim three, the sale of business claim. 533 F.2d, at 1085, fn.9.

pursuant to F.R.App.P. 40, to file a petition for rehearing with the Court of Appeals bringing to its attention any matter which it overlooked—such as the interstate commerce issue. Defendants filed no petition for rehearing with the Court of Appeals. The petition for rehearing filed with the Court of Appeals was by plaintiffs directed to the sale of business claim.

Defendants' arguments regarding interstate trade and commerce must properly arise in the record *(Tyrrell v. District of Columbia,* 243 U.S. 1) and must have been urged and briefed below *(California v. Taylor,* 353 U.S. 553, 557, n.2; *Lawn v. United States,* 355 U.S. 339, 362, n.16; *Neely v. Eby Construction Co.,* 386 U.S. 317, 330). This the defendants did not do.

D. THERE ARE NO CONFLICTS BETWEEN THIS COURT AND THE COURT OF APPEALS ON THE INTERSTATE COMMERCE ISSUE

Because the defendants did not raise the interstate commerce issue in respect to the territorial claim, claim two, the Court of Appeals assumed, as it should, that plaintiffs met their evidentiary burden that the subject restraint operated in or affected interstate commerce. *Goldfarb v. Virginia State Bar,* 421 U.S. 773. As set forth in the statement of the case of this brief, plaintiffs met this evidentiary burden.

In the enactment of Section 1 of the Sherman Anti-Trust Act Congress " 'wanted to go to the utmost extent of its constitutional power in restraining trust

and monopoly agreements. . . .'" *Gulf Oil Corp v. Copp Paving Co.,* 419 U.S. 186, 195 quoting *United States v. South-Eastern Underwriters Ass'n,* 322 U.S. 533, 558.

The Sherman Act extends not only to transactions in the stream of interstate commerce (the "in" commerce theory), but also to intrastate transactions which affect interstate commerce (the "affect" commerce theory). *United States v. Chrysler Corp. Parts Wholesalers,* 180 F.2d 557, 560 (9th Cir.); *Las Vegas Merchant Plumbers Ass'n v. United States,* 210 F.2d 732, 739 (9th Cir.). An effect on interstate commerce is present whether the restraints are applied before the interstate journey begins or after it ends. *Addyston Pipe & Steel Co. v. United States,* 175 U.S. 211; *Eastern States Retail Lumber Dealers v. United States,* 234 U.S. 600.

"'[W]holly local business restraints can produce the effects condemned by the Sherman Act.'" *Hospital Building Co. v. Trustees of Rex Hospital,* 96 S.Ct. 1848, 1852 quoting *United States v. Employing Plasterers Ass'n,* 347 U.S. 186, 189. "'If it is interstate commerce that feels the pinch, it does not matter how local the operation which applied the squeeze.'" *Gulf Oil Corp. v .Copp Paving Co., supra* at 195, quoting *United States v. Women's Sportwear Mfgs. Ass'n,* 336 U.S. 460, 464.

It is well established that the *local* distribution of news and advertisements transmitted "in interstate commerce for the sole purpose of immediate and profitable reproduction and distribution to the reading

public is an inseparable part of the flow of the interstate commerce involved." *Lorain Journal Co. v. United States,* 342 U.S. 143, 151. See *Albrecht v. Herald Co.,* 390 U.S. 145. Thus, plaintiffs' distribution and sale of The Sacramento Bee newspaper is an inseparable part of the flow of news, feature materials, comics and other information which defendants have admitted "is regularly gathered from all parts of the United States and from foreign countries and is distributed and delivered by various means in interstate and foreign commerce to the Sacramento Bee." Likewise, plaintiffs' distribution and sale of The Sacramento Bee newspaper is an inseparable part of the flow of advertising which defendants admit constitutes "a continuous flow in interstate commerce of advertising contracts, copy and payments between advertisers and the Sacramento Bee."

Like the fixing of newspaper distributors' maximum resale prices in *Albrecht v. Herald Co., supra,* the fixing of distributors' territories operates on (the "in" commerce theory) and affects (the "affect" commerce theory) the flow of news, feature materials, comics and other information in interstate and foreign commerce. In *Burke v. Ford,* 389 U.S. 320, 321-22, the Court held:

> "Horizontal territory divisions almost invariably reduce competition among the participants. . . . When competition is reduced, prices increase and unit sales decrease. The wholesalers' territorial division here almost surely resulted in fewer sales to retailers—hence fewer purchases from out-of-state distillers—than would have occurred

had free competition prevailed among the wholesalers."

And as held in *Cooper Liquor Co., Inc. v. Adolph Coors Co.,* 506 F.2d 934, 948 (5th Cir.) the effects upon interstate commerce ascribed to horizontal division of territories in *Burke* are equally attributable to vertically imposed restrictions.

E. THERE ARE NO CONFLICTS BETWEEN THIS COURT AND THE COURTS OF APPEALS ON THE PER SE ILLEGALITY OF TERRITORIAL RESTRICTIONS

The Court of Appeals in this case refused to depart from the well established rule that it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it. *United States v. Arnold, Schwinn & Co.,* 388 U.S. 365, 379. The defendants seek an exemption from this rule for newspaper publishers. For the reasons stated below there is no justification for such an exemption. *Noble v. McClatchy Newspapers, supra* at 1087-89. As exemption for highly perishable Coors beer, which must be refrigerated at all times, was rejected in *Adolph Coors Co. v. Federal Trade Comm'n,* 497 F.2d 1178, 1187 (10th Cir.).

Since the Court's decision in *Schwinn* this Court has consistently adhered to the *per se* illegality of territorial and customer restrictions. The defendants' contention (Petition, p. 16) that this Court did not follow this rule in *Federal Trade Comm'n v. Sperry & Hutchinson & Co.,* 405 U.S. 233 is incorrect. There the Federal Trade Commission explicitly declined to assess S&H's conduct in light of the *Schwinn* holding. However, this Court reaffirmed the holding of *Schwinn.* 405 U.S., at 247, fn. 6. And in *United States v. Topco Associates, Inc.,* 405 U.S. 596 this Court continued to reaffirm the vitality of *Schwinn.*

Defendants' contention that the Ninth Circuit's *en banc* opinion in *GTE Sylvania, Inc. v. Continental TV, Inc.,* ..... F.2d ....., 1976-1 Trade Cases ¶60,848 (9th Cir.) does not square with the decision below in this case is incorrect. (Petition, pp. 11, 12) In *GTE Sylvania* the majority opinion approves the result in this case. *Id.* at ....., fn. 42. And in the order on plaintiffs' petition for rehearing the Court of Appeals herein concluded that there was no inconsistency between the language in *GTE Sylvania* and in the November 14, 1975 opinion in this case. *Noble v. McClatchy Newspapers, supra* at 1091-92. *GTE Sylvania* dealt with location clauses, not territorial or customer restrictions.

Defendants' reliance upon *Williams v. Independent News Co.,* 485 F.2d 1099 (3rd Cir.) as a source of conflict among the circuits is also not well taken. (Petition, p. 16) There the Third Circuit upheld the *per se* illegality of territorial restrictions. 485 F.2d, at 1103. Defendants' reliance on *Tripoli v. Wella Corp.,* 425 F.2d 932 (3rd Cir.) as a source of conflict among the circuits is also not well taken since that case did not deal with territorial restrictions but a prohibition against the sale of potentially hazardous beauty prod-

ucts to persons who were not licensed by the state as barbers and beauticians.

There is no question that the rule of *Schwinn* is firmly established and settled in the law.

F. THERE ARE NO CONFLICTS BETWEEN THE COURTS OF APPEALS ON NOT ADVISING THE JURY THAT IT IS THE FUNCTION OF THE COURT TO TRIPLE THE DAMAGE AWARD OF THE JURY

The Court of Appeals in this case held that it was error for the Court to inform the jury that "it is the function and duty of the Court in the event that you should award damages to treble that amount in the judgment." *Noble v. McClatchy Newspapers, supra* at 1090. The decision below followed the decision of the 10th Circuit in *Semke v. Enid Automobile Dealers Ass'n,* 456 F.2d 1361, 1370 and the 5th Circuit in *Pollock & Riley, Inc. v. Pearl Brewing Co.,* 498 F.2d 1240, 1242-43.

In respect to defendants' argument that jury confusion will result without informing them of the fact that the damages will be trebled, this was answered by the Court of Appeals in *Pollock & Riley, Inc. v. Pearl Brewing Co., supra* at 1243:

> "The basic point urged against this holding is jury confusion. It is asserted that the treble damage feature of the anti-trust law has been publicized enough so that jurors might have some knowledge of it. The argument goes that a little knowledge without a complete explanation from the court will result in totally erroneous verdicts

> and damage awards. Our immediate reaction is that a district court can sufficiently instruct the jury to determine only *actual* damages. In those cases where an accidental revelation occurs, the court can give curative instructions to alleviate confusion."

As to defendants' contention that *Bordonaro Bros. Theatres, Inc. v. Paramount Pictures, Inc.,* 203 F.2d 676 (2d Cir.) is in conflict with the above decisions (Petition, p. 18) this is not correct. The special circumstances of the *Bordonaro Bros.* case do not create a real direct conflict in the circuits. There, based upon a prior action and the trial court's appropriate ruling as to the effect of the judgment there entered, as well as the fact that the matter of treble damages got into evidence, made the giving of an instruction on treble damages not erroneous. 203 F.2d, at 678-79.

In the instant case the trial court entered an order at the beginning of trial prohibiting counsel and the parties from mentioning treble damages. It was only at the conclusion of the trial, in the trial court's jury instructions and in counsel's closing argument, that this order was lifted. Thus, this case is different from the *Bordonaro Bros.* case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

G. JOSEPH BERTAIN, JR.,
TIMOTHY H. FINE,
50 California Street, Suite 955,
San Francisco, California 94111,
Telephone: (415) 981-4938,
Attorneys for Respondents.

August 18, 1976.